

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>YOUSSEF LAFKIR</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,027,789
<b>PIZZA HUT</b>	)	
Respondent	)	
AND	)	
	)	
<b>ACE-USA</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier appealed the December 14, 2007, Award entered by Special Administrative Law Judge Marvin Appling. The Workers Compensation Board heard oral argument on March 28, 2008.

**APPEARANCES**

Gerard C. Scott of Wichita, Kansas, appeared for claimant. Timothy C. Gaarder of Kansas City, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument before the Board, the parties agreed January 31, 2006, was the appropriate date for computing claimant's benefits.

**ISSUES**

Claimant injured his left knee on January 31, 2006, while working for respondent. In the December 14, 2007, Award, Judge Appling found claimant sustained a 28 percent lower extremity functional impairment, which was the rating provided by claimant's medical expert, Dr. Pedro A. Murati. Judge Appling reasoned, as follows:

Dr[.] Jansson gave the claimant 2% impairment of function to the lower left leg. Dr. Murati gave a 28% impairment to the left leg. We could add those two impairments

together and divide however in this case, because the claimant's *[sic]* has continued to have pain from the beginning, I believe the surgery was not as complete as testified to by Dr. Jansson. I find the claimant has a 28% impairment of function to the left leg and order compensation based upon that finding.<sup>1</sup>

Respondent and its insurance carrier contend Judge Appling erred. They argue Dr. Kenneth A. Jansson's opinions are more credible as he was claimant's surgeon and determined claimant sustained only a two percent lower extremity impairment. They also argue Dr. Murati improperly included in his 28 percent functional impairment rating eight percent for atrophy that may resolve, plus 17 percent for cruciate and collateral ligament instability when claimant's injury did not involve those ligaments. The argument of respondent and its insurance carrier is summarized, as follows:

Respondent asserts that claimant is entitled to an award of functional impairment for only those conditions which are permanent in nature and relate to his work accident of January 31, 2006. Namely Respondent asserts that claimant is not entitled to non-permanent impairment such as a temporarily reduced muscle mass in his leg which will return to normal of which Dr. Murati mistakenly classifies as atrophy, nor is he entitled to impairment based on ligament instability when his injury did not involve a knee ligament. Nor is claimant entitled to impairment for pain as found by Judge Appling.<sup>2</sup>

Accordingly, respondent and its insurance carrier argue claimant has patellofemoral syndrome and that claimant's true lower extremity impairment is between Dr. Jansson's two percent rating and Dr. Murati's adjusted five percent rating, or three and one-half percent.

Conversely, claimant contends the Award should be affirmed. Claimant contends Dr. Jansson did not examine him to determine his residual impairment and, therefore, the doctor failed to consider claimant's actual condition in assessing his impairment. Moreover, claimant alleges the doctor rated claimant without actually considering the fourth edition of the *AMA Guides*.<sup>3</sup>

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Board finds and concludes:

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<sup>1</sup> SALJ Award (Dec. 14, 2007) at 3.

<sup>2</sup> Respondent's Brief at 9 (filed Jan. 31, 2008).

<sup>3</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

On January 31, 3006, claimant injured his left knee when he turned and bumped his knee on a piece of equipment, which caused immediate left knee pain. The parties stipulated claimant's accident arose out of and in the course of his employment with respondent.

Claimant sought medical treatment at an emergency room on the day of the accident and was diagnosed as having "[a]brasion left leg/knee, contusion."<sup>4</sup> Claimant returned to the emergency room on February 2 and February 4, 2006, and was given x-rays, ace wrap, a left knee immobilizer, crutches, and pain medication.

Claimant eventually began seeing an orthopedic surgeon, Dr. Kenneth A. Jansson, for treatment of his left knee pain. The doctor, who first saw claimant on May 5, 2006, thought claimant had a torn meniscus and some patellar femoral kneecap problems. Accordingly, the doctor performed a diagnostic arthroscopy on May 30, 2006. During that procedure, the doctor found claimant had a small medial plical band that he resected. The doctor also performed a lateral release to improve the position of claimant's kneecap as it was set in a markedly lateral position. The rest of claimant's knee appeared relatively normal. Dr. Jansson testified, in pertinent part:

He had a diagnostic arthroscopy, which is placing a small camera under his knee to examine the contents. He was found to have a small medial plical band, which is kind of like a scar band, which was resected. And he was also [found] to have a kneecap that set in a markedly lateral position, which we did a lateral release to improve the position. And the rest of his knee was relatively normal, particularly the meniscus, medial and lateral, both looked normal.<sup>5</sup>

Following surgery, the doctor prescribed physical therapy and tried several approaches to reduce claimant's pain. When Dr. Jansson last saw claimant on August 9, 2006, the doctor noted claimant had mild pain complaints anteromedially, despite his physical therapy and medications to reduce his inflammation and pain. The doctor discussed possible injections should claimant's pain continue. Moreover, the doctor released claimant from treatment with no restrictions but told claimant he would see him again if there were any additional questions or problems. Dr. Jansson did not see claimant again after August 9, 2006.

Claimant has not received any medical treatment for his left knee since being released by Dr. Jansson. But at his attorney's request, Dr. Pedro A. Murati examined claimant on November 13, 2006, for purposes of this claim and diagnosed claimant as having left patellofemoral syndrome and having undergone a left knee plical resection and

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<sup>4</sup> Murati Depo., Ex. 2 at 1.

<sup>5</sup> Jansson Depo. at 7.

lateral retinacular release. The doctor recommended that claimant work as tolerated and use common sense.

At his June 2007 regular hearing, claimant testified he had not seen any other doctor since seeing Dr. Murati. He also described the ongoing problems he experienced with his left leg that affected his ability to stand, walk, and kneel.

Q. (Mr. Scott) What kind of problems have you had with your knee?

A. (Claimant) Every time I walk it starts popping, pop, like it's making noises. I get inflammation all over, and I get like a scar inside the kneecap, every time I make like a movement or something it's opened, so it's giving me inflammation all the time, and every time it starts raining or it's getting cold, it gives me pain, too.<sup>6</sup>

. . . .

Q. . . . What else do you want to tell the Judge about your knee, and what problems you have with it?

A. Yeah. Every time I walk it starts like making noises, like a bone with bone touching, and it's like under the kneecap on this side, when I touch it, it gives me pain. Every time I have a movement, or I keep standing for a long period of time, this side is open. (Indicating)

THE COURT: He's pointing to the inside of his left knee as he's describing it.

A. Yeah, on this side. That's the side of the release, the release.

Q. How, if any, does -- let me start that again. In what ways does this problem, the pain that you have in your knee interfere with your activities?

A. Yeah. As I said, every time I keep standing for a long period of time it gives me pain.

Q. Does that cause you to have to sit down?

A. Yeah, sit down, and the problem, I cannot kneel for a long period of time. I have to make it straight, make my knee straight when I kneel, because it gives me like

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<sup>6</sup> R.H. Trans. at 8.

a cramping -- cramping on this side, and the doctor, he knows about it. I complain about it all the time.<sup>7</sup>

At the time of the regular hearing, claimant was employed at a grocery store working eight hours per day, four days a week.<sup>8</sup> In addition, claimant was in his last semester of technical college, where he was earning a degree in air conditioning technology.<sup>9</sup>

### **Functional impairment**

Without seeing claimant again after releasing him from treatment in early August 2006, Dr. Jansson rated claimant as having a two percent impairment to the left lower extremity. The doctor based claimant's impairment upon medical guidelines and his years of medical experience. Dr. Jansson is board-certified in orthopedic surgery and specializes in arthroscopic and knee surgery along with sports medicine. The doctor testified, in part:

Q. (Mr. Gaarder) Very good. How did you go about formulating that opinion?

A. (Dr. Jansson) Well, it's based on medical guidelines and based on my experience and based on what we normally judge that by.<sup>10</sup>

. . . .

Q. The two percent impairment rating that you attributed to Mr. Lafkir's injury did you find that to be solely related to his work accident of January 31 of 2006?

A. Well, two percent is related to the continued subjective complaint of pain, and objectively there is not that much to see, so it's based on his continued pain complaints.

Q. Just to be clear, Doctor, objectively from the films post surgery and the position of his knee, is it your opinion that the knee itself really has no objective findings?

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<sup>7</sup> *Id.* at 9, 10.

<sup>8</sup> See R.H. Trans. at 20.

<sup>9</sup> P.H. Trans. at 24 and R.H. Trans. at 24.

<sup>10</sup> Jansson Depo. at 11.

A. Well, I don't believe -- I don't think we took post-operative films, but based on examination arthroscopically and pre-operative films and physical examinations on numerous occasions that's what we are drawing our conclusions on.<sup>11</sup>

The record does not establish that Dr. Jansson's rating was based upon the fourth edition of the *AMA Guides*.

The only other medical opinion in the record that addressed claimant's functional impairment was provided by claimant's medical expert, Dr. Pedro A. Murati. Dr. Murati is board-certified in physical medicine and rehabilitation, electrodiagnostic medicine, and independent medical evaluations. Citing tables and pages from the fourth edition of the *AMA Guides*, the doctor determined claimant had a five percent left lower extremity impairment for patellofemoral syndrome, an eight percent lower extremity impairment for left thigh atrophy, and a 17 percent lower extremity impairment for cruciate and collateral instability, all of which combine for a 28 percent impairment to the lower extremity.<sup>12</sup>

Dr. Murati found claimant had full range of motion in his left knee and that he scored a 5 out of 5 for muscle strength. The doctor also found claimant had bilateral Osgood-Schlatter deformities that were not related to claimant's injury at work. But the doctor did find that claimant had a positive Lachman test, which tests cruciate instability.<sup>13</sup> The doctor testified, in part:

Q. (Ms. Grant) I understand. What specifically did you find in your examination that warranted a finding of moderate category as opposed to mild?

A. (Dr. Murati) Okay. Yeah. Lachman's test on the left, which was not present on the right.

Q. And what is the Lachman's test?

A. It tests for cruciate instability.

Q. How specifically do you administer the test?

A. Well, you pull on the leg while you hold the thigh stable, and if you can feel the tibia tighten up, you know, then you know that there is cruciate instability. And he also had lateral knee instability, which would test the lateral/collateral, and in my

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<sup>11</sup> *Id.* at 11, 12.

<sup>12</sup> Murati Depo. at 11.

<sup>13</sup> *Id.* at 23.

view on that date I thought it was a moderate condition so I rated it as a moderate condition.<sup>14</sup>

Dr. Murati noted the full range of motion in claimant's knee did not preclude a finding of joint instability as individuals with knee joint instability will probably have full range of motion because the joint is more lax.

In summary, claimant injured his left knee and underwent a diagnostic arthroscopy, which included a resection of the medial plicial band and a lateral retinacular release. Dr. Jansson rated claimant for left knee pain. Dr. Murati rated claimant for left thigh atrophy and the arthritis and weakness in his knee.

Claimant's injuries are confined to his left leg. Accordingly, his injury is included in the schedule of K.S.A. 44-510d. And that statute provides that the fourth edition of the *AMA Guides* must be used to determine claimant's disability benefits.

Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>15</sup>

Dr. Murati's testimony is uncontradicted that he used the fourth edition of the *AMA Guides* to rate claimant. And uncontradicted medical testimony cannot be disregarded, unless it is shown to be improbable, unreasonable or untrustworthy.<sup>16</sup> Dr. Murati set out his findings that he considered in determining claimant's diagnosis and impairment. The Board is not persuaded that Dr. Murati's opinions were improbable, unreasonable, or untrustworthy. Consequently, the Board must consider Dr. Murati's 28 percent lower extremity rating. Since the 28 percent rating is the only one that was shown to be formulated by using the required edition of the *AMA Guides*, the Board must find claimant has proven he has sustained a 28 percent functional impairment rating to his left lower extremity.

In conclusion, for the reasons above, the Board finds claimant sustained a 28 percent impairment to his left leg due to his January 31, 2006, accident. Accordingly, that part of the Award is affirmed. But the computation of the award should be modified as the

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<sup>14</sup> *Id.* at 23, 24.

<sup>15</sup> K.S.A. 44-510d(a)(23).

<sup>16</sup> See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

Judge used 190 weeks rather than 200 weeks to compute claimant's permanent disability weeks.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>17</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, the Board modifies the December 14, 2007, Award as follows:

Youssef Lafkir is granted compensation from Pizza Hut and its insurance carrier for a January 31, 2006, accident and resulting disability. Based upon an average weekly wage of \$266.73, Mr. Lafkir is entitled to receive 7.25 weeks of temporary total disability benefits at \$177.83 per week, or \$1,289.27, plus 53.97 weeks of permanent partial disability benefits at \$177.83 per week, or \$9,597.49, for a 28 percent permanent partial disability, making a total award of \$10,886.76, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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<sup>17</sup> K.S.A. 2007 Supp. 44-555c(k).



c: Gerard C. Scott, Attorney for Claimant  
Timothy C. Gaarder, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge  
Marvin Appling, Special Administrative Law Judge